

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

|  |   |            |
|--|---|------------|
| In the Matter of                             | ) |            |
|  | ) |            |
| Comcast Cable Communications, LLC, on Behalf | ) | CSR-7186-E |
| of Its Subsidiaries and Affiliates           | ) | CSR-7187-E |
|  | ) | CSR-7195-E |
| Petition for Determination of Effective      | ) |            |
| Competition in Seventeen Communities in      | ) |            |
| California                                   | ) |            |

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 29, 2008**

**Released: May 30, 2008**

By the Senior Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. Comcast Cable Communications, LLC, on behalf of its subsidiaries and affiliates, hereinafter referred to as "Petitioner," has filed with the Commission petitions pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as "Communities." Petitioner alleges that its cable systems serving the Communities are subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act of 1934, as amended ("Communications Act")<sup>1</sup> and the Commission's implementing rules,<sup>2</sup> and are therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and Dish Network ("Dish"). Only one opposition was filed, by the City of Cupertino, California (the "City"), concerning the Cupertino City franchise area ("Cupertino").<sup>3</sup> Petitioner filed a Reply to the City's Opposition.<sup>4</sup>

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>5</sup> as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.<sup>6</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>7</sup> For the reasons set forth below, after giving due consideration to the City's Opposition, we grant the petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

<sup>1</sup>See 47 U.S.C. § 543(a)(1).

<sup>2</sup>47 C.F.R. § 76.905(b)(2).

<sup>3</sup> Opposition to Petition for Determination of Effective Competition ("Opposition"), filed by the City of Cupertino and dated May 11, 2007.

<sup>4</sup> Reply to Opposition ("Reply"), filed by Petitioner on May 24, 2007.

<sup>5</sup>47 C.F.R. § 76.906.

<sup>6</sup>See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

<sup>7</sup>See 47 C.F.R. §§ 76.906 & 907.

## II. DISCUSSION

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.<sup>8</sup> This test is otherwise referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.<sup>9</sup>

5. Turning to the first prong of this test, it is undisputed that these Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.<sup>10</sup> The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.<sup>11</sup> We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Communities to support their assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.<sup>12</sup> The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming<sup>13</sup> and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.<sup>14</sup> Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.<sup>15</sup> Accordingly, we find that the first prong of the competing provider test is satisfied.

6. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in the Communities.<sup>16</sup> Petitioner sought to determine the competing provider penetration in the Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code and zip code plus

<sup>8</sup>47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>9</sup>47 C.F.R. § 76.905(b)(2)(i).

<sup>10</sup>*See* Petition in CSR 7186-E at 2-3.

<sup>11</sup>*Mediacom Illinois LLC et al., Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd 1175 (2006).

<sup>12</sup>47 C.F.R. § 76.905(e)(2).

<sup>13</sup>*See* 47 C.F.R. § 76.905(g). *See also* Petition in CSR 7187-E at 4.

<sup>14</sup>*See* Petition in CSR 7195-E at Exh. 2.

<sup>15</sup>*See* Petition in CSR 7186-E at 2-3.

<sup>16</sup>Petition in CSR 7187-E at 5.

four basis where necessary.<sup>17</sup>

7. Of all the Communities, only one, the City of Cupertino, challenges Petitioner's calculations.<sup>18</sup> Petitioner began its calculation for Cupertino by taking the one zip code, 95014, that encompasses all of Cupertino and a small area outside it.<sup>19</sup> SBCA informed Petitioner that that zip code contained 3,631 DBS subscribers.<sup>20</sup> Media Business Corporation ("MBC," formerly known as SkyTrends) calculated, and advised Petitioner, that 92.75 percent of the DBS subscribers in the zip code were in Cupertino. Petitioner then used that percentage to conclude that there were 3,368 DBS subscribers in Cupertino. Dividing that number by the 18,204 Census 2000 households in Cupertino, Petitioner calculated that 18.50 percent of the households there subscribe to DBS service.<sup>21</sup> That exceeds the 'in excess of 15 percent' minimum in the second part of the competing provider test.

8. The City makes several objections to Petitioner's calculations. First, it complains that Petitioner may have misinformed the SBCA about the boundaries of Cupertino. It speculates that Petitioner may have included in Cupertino areas that are outside it, where population is sparse, cable service is relatively unpopular or non-existent, and DBS service is relatively popular – factors that would cause Petitioner to mistakenly overstate DBS penetration in Cupertino. It asks that Petitioner disclose what it told SBCA about the boundaries of Cupertino.<sup>22</sup> The City voices other general doubts about the detail and accuracy of Petitioner's calculations and the underlying data.<sup>23</sup> The City also attacks 2000 Census data as a stale measure of the number of households in Cupertino, especially when paired with DBS penetration data from 2006. The City notes that Cupertino has grown from 18,204 households in the 2000 Census to, according to the California Department of Finance, 19,892 housing units in 2006.<sup>24</sup>

9. The City's objections are without merit. In many decisions, we have accepted evidence and showings such as Petitioner made for Cupertino. They suffice to sustain the cable operator's initial burden of proof and cannot be overturned by franchising authorities expressing only generalized concerns and doubts.<sup>25</sup> It is reasonable to require franchising authorities to present factual evidence and showings about their own communities. In this case, that might have been a fact-based, numerical estimate of the amount by which Petitioner's inclusion of DBS subscribers inside zip code 95014 but outside Cupertino overestimated DBS penetration in the latter. The City failed to produce such support for its position and failed to impair the evidence and showings presented by Petitioner.

<sup>17</sup>Petition in CSR 7195-E at 4-5 & Exh. 5. A zip code plus four analysis allocates DBS subscribers to a franchise area using zip code plus four information that generally reflects franchise area boundaries in a more accurate fashion than standard five digit zip code information.

<sup>18</sup>The City "accepts (without conceding)" that Petitioner has satisfied this first part of the competing provider test for Cupertino. Opposition at 2.

<sup>19</sup>Reply at 2.

<sup>20</sup>Petition, Exh. 5.

<sup>21</sup>*Id.*, Exh. 6 at 1.

<sup>22</sup>Opposition at 3-4.

<sup>23</sup>*Id.* at 4.

<sup>24</sup>*Id.*

<sup>25</sup>*See, e.g., Bright House Networks, LLC*, Memorandum Opinion & Order, 22 FCC Rcd 4390, 4393, ¶ 10 (2007); *Comcast Commun., LLC*, Memorandum Opinion & Order, 22 FCC Rcd 694, 695-99, ¶¶ 4-14 (2007); *Charter Commun.*, Memorandum Opinion & Order, 21 FCC Rcd 11268, 11270-71, ¶¶ 6-7 (2006); *Charter Communications, Inc.*, Memorandum Opinion & Order, 19 FCC Rcd 6878, 6881, ¶ 10 (2004) ("Charter met its initial burden of coming forward with evidence . . . by presenting DBS subscriber penetration levels developed from subscriber allocation figures based on the five digit Zip Code data discussed above. LFA argument alone that such data may be flawed failed to rebut Charter's evidentiary showing.").

10. More specifically, Petitioner cannot have misinformed SBCA about the boundaries of Cupertino because Petitioner merely supplied SBCA with the relevant zip code.<sup>26</sup> In addition, our decisions have consistently used the most recently completed Census data for purposes of calculating DBS penetration.<sup>27</sup> We will accept more recent household data that is demonstrated to be reliable,<sup>28</sup> but the City has produced no such data here. Rather, it has produced only data about the total number of housing units in Cupertino, occupied and unoccupied.<sup>29</sup> Only occupied housing units, however, are the material measure in effective competition cases.<sup>30</sup> Finally, even if we used the City's proposed housing unit count to measure DBS penetration in Cupertino, the measurement would be 16.93 percent, still satisfying the statutory test of in excess of 15 percent.<sup>31</sup>

11. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,<sup>32</sup> as reflected in Attachment A, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Communities.

12. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment A.

---

<sup>26</sup>Reply at 2.

<sup>27</sup>See, e.g., *CoxCom, Inc.*, Memorandum Opinion & Order, 22 FCC Rcd 4384, 4386-87, ¶ 9 (2007); *CC VIII Operating, LLC*, Memorandum Opinion & Order, 19 FCC Rcd 6204, 6205, ¶ 4 (2004); *MediaOne of Georgia, Inc.*, Memorandum Opinion & Order, 12 FCC Rcd 19406, 19408, ¶ 4 (1997).

<sup>28</sup>See, e.g., *Adelphia Cable Commun.*, Memorandum Opinion & Order, 22 FCC Rcd 4458, 4462, ¶ 14 (2007); *Bright House Networks, LLC*, Memorandum Opinion & Order, 20 FCC Rcd 16823, 16827 ¶ 10 (2005); *MCC Iowa LLC*, Memorandum Opinion & Order, 20 FCC Rcd 15267, 15270, ¶ 8 (2005).

<sup>29</sup>Opposition at 4; Reply, Exh. 1.

<sup>30</sup>See, e.g., *Bright House Networks, LLC*, Memorandum Opinion & Order, 22 FCC Rcd 4161, 6165, ¶¶ 11 (2007); *MCC Iowa LLC*, 20 FCC Rcd at 15270 ¶ 7; *Mediacom Minnesota LLC*, Memorandum Opinion & Order, 18 FCC Rcd 12768, 12770-71 ¶ 8 (2003).

<sup>31</sup>Reply at 5 (3,368 divided by 19,892 is 16.93). Or, if we used the number of households (occupied housing units) in 2006 estimated by the California Department of Finance in Exhibit 1 to the Reply, 19,387, DBS penetration (3,368 divided by 19,387) would be 17.37%, still in excess of 15%.

<sup>32</sup>Petition in CSR 7187-E at 6-7.

### III. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by Comcast Cable Communications, LLC, on Behalf of Its Subsidiaries and Affiliates, **ARE GRANTED**.

14. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

15. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>33</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckert  
Senior Deputy Chief, Policy Division, Media Bureau

---

<sup>33</sup>47 C.F.R. § 0.283.

## ATTACHMENT A

## CSR 7186-E, 7187-E, 7195-E

COMMUNITIES SERVED BY COMCAST CABLE COMMUNICATIONS, LLC, ON BEHALF  
OF ITS SUBSIDIARIES AND AFFILIATES

| Communities     | CUID(s)  | CPR*   | 2000<br>Census<br>Households | Estimated<br>DBS<br>Subscribers |
|-----------------|--|--------|------------------------------|---------------------------------|
| Alameda County  | CA0185<br>CA0238<br>CA0364<br>CA1334<br>CA1537 | 22.54% | 48529                        | 10939                           |
| Atherton        | CA1435   | 37.30% | 2413                         | 900                             |
| Cupertino       | CA0492<br>CA0843                               | 18.50% | 18204                        | 3368                            |
| East Palo Alto  | CA1434   | 21.50% | 6976                         | 1500                            |
| Hayward         | CA0370   | 27.05% | 44804                        | 12118                           |
| Los Altos       | CA1228   | 31.53% | 10462                        | 3229                            |
| Los Altos Hills | CA1439   | 34.03% | 2740                         | 932                             |
| Los Gatos       | CA0240   | 25.19% | 11988                        | 3020                            |
| Menlo Park      | CA1433   | 19.13% | 12387                        | 2370                            |
| Milpitas        | CA0169   | 27.91% | 17132                        | 4781                            |
| Monte Sereno    | CA0514   | 25.99% | 1211                         | 315                             |
| Portola Valley  | CA1464   | 33.69% | 1700                         | 573                             |
| San Leandro     | CA0416   | 24.37% | 30642                        | 7467                            |
| Santa Clara     | CA0455   | 17.47% | 38526                        | 6731                            |
| Saratoga        | CA0771   | 27.93% | 10450                        | 2918                            |
| Union City      | CA0901   | 30.36% | 18642                        | 5659                            |
| Woodside        | CA1463   | 29.25% | 1949                         | 570                             |

\*CPR = Percent of competitive DBS penetration rate.